OCT 4 1904
JAMES H. McKENNEY,
Clerk

IN THE

Supreme Court of the United States.

EMMA S. FAYERWEATHER and MARY W. ACHTER,
Appellants,
vs.
THOMAS G. RITCH *et als.*, individually and as Executors, &c.; The President and Trustees of Bowdoin College *et als.*

157.

JOHN B. REYNOLDS, Executor of the Last Will, &c., of Lucy Fayerweather,
Appellant,
vs.
THOMAS G. RITCH *et als.*, individually and as Executors, &c.; The President and Trustees of Bowdoin College *et als.*

158.

BRIEF OF THE RESPONDENTS.

The President and Trustees of Bowdoin College.

Statement.

The appeals are from decrees of the Circuit Court of the United States for the Southern Dis-

trict of New York, made January 14, 1901, and October 14, 1902, in favor of defendants in a bill filed by Emma S. Fayerweather and Mary W. Achter, and a cross-bill filed by John B. Reynolds, executor of the will of Lucy Fayerweather (see Vol. 4 of Record, pp. 629, 777, 839).

It is not easy to conceive that any court could have reached a different decision upon consideration of all the facts disclosed by the record. Yet it is thought that this appeal may be determined without prolonged discussion of the story told in the thirty-three hundred odd pages of the record and without detailed argument of the one hundred and twenty-nine assignments of error specified in fifty-four of its pages (Record, Vol. 4, pp. 784–838).

It is thought that this appeal may be determined by consideration of the question whether the same issues between the same parties have been presented, heard and determined in the Courts of the State of New York; whether the parties have there had "their day in Court" and that an examination of the parts of the record pertinent to these questions will be sufficient.

The will of Daniel B. Fayerweather made October 6, 1884, gave to twenty colleges bequests that amounted in the aggregate to twenty-one hundred thousand dollars, and directed his executors, as trustees, to divide the residue of his estate equally among the same institutions (Vol. 4, pp. 183, 186, 187). This provision was known by Mr. Fayerweather to be contrary to the New

York statute (Chapter 360, Laws of 1860) that forbids a testator who has husband, wife, child or parent from giving to benevolent or literary institutions more than one half his estate (Record, Vol. 4, pp. 55–220).

On the 15th day of December, 1884, Mr. Fayerweather made a codicil that revoked so much of his will as gave the residue of the estate to the colleges and, in lieu of the provision revoked, gave the residue to the two individuals who were then his only executors. One of them was also his counsel (Vol. 4, p. 189). Mr. Fayerweather afterwards made several codicils. A considerable part of the testimony that fills the record relates to the time and manner of their execution and the motives and influences that attended their preparation. This testimony is not material to the question now under consideration; for the later codicils did not change the devise and bequest of the residue of the estate to individuals. They merely added a third executor and made him a residuary devisee and legatee with the two already appointed (Record, Vol. 4, p. 196). Mr. Fayerweather died November 15, 1890, nearly six years after the first codicil was executed. The probate of his will was contested by his widow and by the two nieces who are complainants in the bill. On the 25th of February, 1891, while the contest was pending, the three executors and residuary devisees and legatees made an instrument called a deed of gift by which they transferred all their interest in the

residuary estate, to, or for the benefit of, various individuals and institutions. Most of these were unmentioned by the testator in his will. The donors in the deed of gift recite that it is "prompted by our determination that we will not retain for our own use any part of the residuary estate left to us, * * * and by this devise to make such disposition of his" (Mr. Fayerweather's) "residuary estate, as in our judgment will best honor his memory." They also recite "our object is each for himself to give away whatever may come to us as residuary devisees and legatees under Fayerweather's will" (Record, Vol. 4, pp. 198–203). This instrument reserved to the donors the right to enlarge, or assent to the enlargement of, the provisions made by the will for the widow and the two nieces. Following this reservation, and on March 5, 1901, the executors and residuary devisees and legatees made another instrument enlarging said provisions (Record, Vol. 4, pp. 205–207). On the same day, March 5, 1901, the widow and nieces "in consideration of the instrument of even date" agreed to withdraw all objections to the probate of the will and codicils and upon payment to them "of all the several amounts mentioned in said deed of gift and said instrument to execute a general release of all claims," &c. (Record, Vol. 4, pp. 208–209). Payments were afterwards made and releases executed as agreed (Record, Vol. 4, pp. 210–212). Most of the colleges assented to the preferential payments (Record, Vol. 4, pp. 245–

247). These arrangements ended the contest in the Surrogate's Court and the will and codicils were admitted to probate (Record, Vol. 4, pp. 226–240).

After these things had been done five of the colleges brought suit in the Supreme Court of the State of New York against the executors of Mr. Fayerweather's will, the executors of the will of Mrs. Fayerweather, deceased after the settlement mentioned above, the nieces, the beneficiaries under the deed of gift and all the colleges not joined as plaintiffs (Record, Vol. 1, pp. 26–41). The claim made in this suit was that the codicil which gave the residue of the estate to individuals was made in pursuance of an agreement that the individuals should receive the residue in trust for the colleges mentioned in the will and should distribute it among them. The complaint in said suit set up the proceedings in the Surrogate's Court, the contest of the will and codicils, the settlement of the contest, the deed of gift and the releases given by the widow and the nieces (Record, Vol. 1, pp. 37–38). The relief asked was that the agreement between the testator and the executors should be enforced as a trust; that payments under the deed of gift should be enjoined; that the executors should be adjudged to apply the residuary estate to the purposes of said trust and that the ultimate rights of all the parties should be determined in said action in accordance with the allegations and prayer of the complaint (Record, Vol. 1, pp, 39–40).

The suit is known as the case of Amherst College against Ritch.

The widow's executors and the nieces appeared in the suit and made answer and counterclaim (Record, Vol. 1, pp. 42–61). By their answer they asserted that the agreement which the suit was brought to enforce was a secret trust made for the purpose of evading the New York Statute by giving more than half the estate to literary institutions (Record, Vol. 1, pp. 45–55). They alleged that the releases they had given were obtained by concealment and fraud and were therefore of no obligation (Record, Vol. 1, pp. 55–57); that the releases should be set aside; that the deed of gift should be adjudged void. They demanded as relief that the executors should be decreed to hold in trust for them and to pay over to them, their proportions of so much of the residue of the estate as should be in excess of one-half thereof, and that the ultimate rights of the parties to the action in the estate of David B. Fayerweather be determined and enforced by judgment in said action in accordance with the allegations and prayers of the answer (Record, Vol. 1, pp. 59-61).

The issues thus made were tried before Judge Truax at Special (Equity) Term of the Supreme Court and were decided in favor of the colleges.

The *opinion* of the Court recites the settlement of the contest in the Surrogate's Court, the execution and delivery by the widow and nieces of the releases agreed upon as part of the settlement, and mentions that the widow's representa-

tives and the nieces ask to have the releases set aside (Record, Vol. 4, pp. 27–29). It reviews a large number of cases from which the Court concludes that the understanding between the testator and his executors created a trust in favor of the colleges (Record, Vol. 4, p. 47) and states: "The view that I have taken of the facts and the law of this case renders it unnecessary for me to consider the very interesting questions of law propounded by the learned counsel for the defendants Reynolds, Achter and Fayerweather" (Record, Vol. 4, p. 50 and pp. 20–51).

The *decision* of the Court stated as the grounds upon which the issues were decided that the executors promised the testator that if he would make them residuary legatees they would divide the residuary estate equally among the corporations mentioned in the ninth paragraph of his will. It directed judgment accordingly in favor of the colleges (Record, Vol. 1, pp. 63-65).

The *judgment* of the Court bears date December 28, 1894 (Record, Vol. 1, pp. 66–72). It decrees that the residuary estate be held in trust for the colleges and divided among them and that the executors be enjoined from making payments under the deed of gift (Record, Vol. 1, pp. 70–71).

In the progress of the cause at bar Judge Truax was examined as a witness touching the grounds of his decision. He testified: "As I remember now, the heirs Reynolds and Achter and Fayerweather sought to set aside certain releases upon the ground that those releases had been obtained

from them by fraud or deceit, and one of the principal claims that they made, one of the principal evidences of fraud was the gross inadequacy of the consideration. Under my view of the law they got $310,000 for nothing. They did not have anything to release, and, not having anything to release, they got more than they were entitled to when they got the $310,000. So it was unnecessary for me to consider, as I thought, any of the questions propounded by them" (Record, Vol. 2, pp. 523–524).

Judge Truax further testified that he thought they had no interest in the estate "because it went, either under the deed of trust or the will, to somebody else; that is, part of it went under the will and another part of it went under the secret agreement or the secret trust." He also testified that counsel for the executor of Mrs. Fayerweather and the nieces participated in the trial of the cause. In answer to the question whether every opportunity was given them to introduce whatever evidence they had to present, he answered: "Every opportunity was given to them to try to introduce it. Sometimes there were objections taken, you know; that is, there may have been. I do not remember now" (Record, Vol. 2, p. 526).

The executors of Mrs. Fayerweather's will and the nieces appealed to the General Term of the Supreme Court from the Judgment of the Special Term (Record, Vol. 4, p. 15). The General Term, held by Judges Charles H. Van Brunt, Alton B.

Parker and David L. Follett, affirmed the judgment of the Special Term.

Record, Vol. 4, pp. 60–62.

Judgment of affirmance was duly entered.

Record, Vol. 4, pp. 63–69.

Judge Follett and Presiding Justice Van Brunt delivered opinions for affirmance and there was no dissent (Record, Vol. 4, pp. 52–59).

Judge Follett, in his opinion, says: "The Special Term found the following facts." He quotes from the Special Term decision its statement of the grounds on which the issues have been decided (Record, Vol. 1, p. 63, and Vol. 4, pp. 53–54), and adds, "These facts are amply supported by the evidence." Referring to the testimony that supports the decision he says: "The residuary legatees acquired no personal interest in the residuum, but took it as trustees." The opinion then states that "the executors of the testator's widow and two of his heirs at law and next of kin seek to have the residuary clause declared invalid under Chapter 360 of the Laws of 1860." The opinion quotes the law referred to and proceeds as follows: "The difficulty with their contention is that the widow and heirs released all of their interest in the estate for valuable considerations paid to them. * * * It is urged that these releases were procured by fraud and undue influences. There is no evidence in the record justifying this contention. The terms of settle-

ment were agreed on during the controversy in the Surrogate's Court over the probate of the will and codicils, and the widow and heirs were represented in that controversy and in the settlement by distinguished counsel and acted under their advice" (Record, Vol. 4, pp. 54-55).

The opinion of Presiding Justice Van Brunt states: "The testator left him surviving a widow, who was the only person who could call into operation for her protection the statute which we have quoted. The widow, however, has released to the executors all claims to the estate, which release cannot be successfully attacked or set aside. There is, consequently, no person for whose benefit the statute can operate. No rights of heirs and next of kin have been infringed upon, because the trust does not contravene any statute for their benefit and is not the subject of attack by them. If it were, they have also executed a release of their interest in the estate in the same manner as the widow" (Record, Vol. 4, p. 59).

In the progress of the cause at bar, Judge Alton B. Parker was examined as a witness touching the decision of the General Term, in which he took part (Record, Vol. 3, pp. 440–443 and 561–574.

When the examination commenced Judge Parker said, "At this point I desire to enter my most earnest protest against this method of ascertaining what has been decided by the courts. I should deem it my duty to refuse to be interrogated on this subject, were it not that Mr. Justice

Truax has seen fit, mistakenly, I think, to give testimony as to what was decided at Special Term. This course on his part persuades me to give testimony, lest perchance a refusal might be misunderstood."

Judge Parker was referred to the opinion of Judge Follett at General Term, in which he had concurred, and was asked:

"Is it a fact that upon the argument of this case it was urged before the Court by counsel for them" (the nieces) "and the executors of the testator's widow, that the releases referred to in the opinion were procured by fraud and undue influences?" He answered, "That is my recollection." He was asked, "Was this urged by their counsel by oral argument as well as by printed brief?" His answer was, "Yes."

And he answered "Yes" to the question "Is it a fact that the subject was considered by the Court; that the record upon the appeal was examined by the Court, and that the Court decided that there was no evidence in the record to justify this contention?" (Record, Vol. 3, pp. 442–443).

On cross-examination by counsel for the widow's executor and the nieces, Judge Parker was asked if the three judges at General Term considered and decided that none of the evidence before Judge Truax had any legal tendency to establish the charges of fraud or other charges set up to impeach the releases. He answered, "My recollection is not very distinct, of course, but it is not that there was not any evidence, but that there

was not sufficient evidence to impeach them" (Record, Vol. 3, p. 563).

He was asked if the judges at General Term differed in respect to the relevancy and weight of the evidence adduced to impeach the releases, according as such evidence affected the claim of the widow and the claims of the nieces.

He answered, "It is my impression that there was no difference in that respect."

He was asked questions elaborately framed to express the cross-examining counsel's argument upon the facts relating to the releases (Record, Vol. 3, pp. 569–570), and to ascertain whether the General Term agreed with Judge Truax's opinion that the widow and the next of kin did not have anything to release and to ascertain whether the General Term did not affirm the judgment on the ground that although the widow and nieces did have something to release they had effectually released whatever they had; and to ascertain whether in the opinion of the witness and with reference to Section 1022 of the New York Code of Civil Procedure, and the rule of law as established by the New York decisions, the General Term should not have reversed the judgment and sent the case back for a new trial, and whether the General Term had the power to affirm the judgment, on grounds differing from those on which the judgment was rendered by the Court below.

To these questions he replied, in substance, that the General Term did not agree with Judge

Truax that the widow and nieces had nothing to release, yet affirmed the judgment, and "necessarily were led to do so on the theory that the evidence did not require a finding that the releases were fraudulently procured" (Record, Vol. 3, p. 567). He said (p. 568): "Appellate courts, both in the Appellate Division and the Court of Appeals, occasionally refuse to send back a case where it is plain from the record that no different result can ensue."

He said (p. 568), "I do not think any member of the Court questioned the power to make the decision as it was made."

He said (p. 568), "I do not recall that there was anything said about Section 1022."

He said (p. 571), "The majority of the Court did make such an examination of the record as satisfied their minds as to the facts, but the details I do not now recollect."

An appeal from the decision of the General Term was taken to the Court of Appeals and the judgment was affirmed (Record, Vol. 4, pp. 70–112. See also 151 N. Y., p. 282).

Chief Justice Andrews dissented from the opinion of Judge Vann which was concurred in by all the other members of the Court.

The prevailing opinion mentions that the Court of Appeals "has jurisdiction to decide only questions of law" (p. 72); refers to the established doctrine that whether there is any evidence to sustain a verdict, or judgment, is a question of law and summarizes the evidence relating to the

releases to show that there was "ample evidence to warrant the inference that there was no fraud" in obtaining them. While this summary is made for the purpose of indicating the extent to which the Court of Appeals might deal with the facts of the case, it also makes plain that there was no evidence of fraud upon which a verdict or judgment could stand (Record, Vol. 4, pp. 73–75).

After the decision by the Court of Appeals the counsel for the widow's executor and the nieces moved to have the remittitur of the Court amended so as to direct the Justice of the Supreme Court before whom the cause was tried at Special Term to consider the evidence "concerning the agreements to release and the releases" * * * "and to determine if said agreements and releases are valid and binding, or if they are invalid and void" (Record, Vol. 4, p. 113; pp. 115–125, 130–142).

The motion was denied by order of the Court of Appeals made March 9, 1897 (Record, Vol. 4, p. 142*a*).

After proceedings in the courts of the State were thus terminated, and in July, 1897, Emma S. Fayerweather and Mary W. Achter, complainants in the cause at bar, verified their bill of complaint in the Circuit Court of the United States (Record, Vol. 4, pp. 1–25). In February, 1899, John B. Reynolds, as sole executor of the will of Lucy Fayerweather, verified his cross-bill in the same cause (Record, Vol. 1, pp. 262–276).

The parties to this cause are identical with the

parties to the suit, Amherst College *vs.* Ritch, save that in this cause John B. Reynolds appears as sole executor of the will of Lucy Fayerweather, whereas in the Amherst College case Morris B. Beardsley appeared with him as co-executor (Record, Vol. 1, pp. 1–2 and 66–67).

The amended bill of complaint alleges the proceedings between the same parties (p. 5) in the Supreme Court of the State of New York; alleges that the issues raised as to the validity of the releases were not tried (p. 7); alleges that the General Term of the Supreme Court should have required said issues to be disposed of by the trial Court, but did not so require; alleges the proceedings in the Court of Appeals (p. 8); alleges that complainants have exhausted their remedy in the courts of the State (p. 9); recites again the history of the Fayerweather will, the contest and the settlement; asserts the title of the complainants to portions of the estate; alleges that the judgment of the Supreme Court of the State is a cloud upon their title (p. 21) and not a bar to an adjudication in this cause; prays that the complainants may be adjudged to have their proportion of the estate as heirs at law of Daniel B. Fayerweather and that the releases they have given may be declared void (pp. 22–23). The bill makes certain allegations as to the later codicils of Mr. Fayerweather, but, as those did not substantially change the disposition of the estate made by the first codicil, the allegations are not here detailed. The cross-bill of John B. Reynolds

prays relief substantially like that asked in the bill of complaint. In addition, it asks that a will said to have been made by Mr. Fayerweather in 1880, some four years before the will admitted to probate, may be recognized as his last will and testament (Record, Vol. 1, pp. 267, 273, 274).

Pleas and supporting answers, setting up the adjudications in the State courts in bar of this action, were filed by the various defendants, and in May, 1902, the Circuit Court made an order that defines the position of parties in respect to pleadings and proofs (Record, Vol. 1, pp. 176–187, and Vol. 4, pp. 657–664). The proceedings in the Circuit Court resulted in the decree brought here by appeal.

The subject matter of this suit is the interest of Mrs. Fayerweather's executor and of Mr. Fayerweather's nieces in the estate of Daniel B. Fayerweather.

This was the subject matter of the suit tried and determined in the courts of the State of New York.

The theory by which the complainants and the cross-complainant in this cause seek to avoid the effect of the prior adjudication between the same parties of the same subject of litigation, so far as such theory can be discerned through their pleadings and assignments of error, is that the issue as to the validity of the releases has never been tried by a court of original jurisdiction, and that, as to that issue, they have never had "their day in court."

The assignments of error which insist that the

Circuit Court of the United States erred because it did not turn itself into a New York County Surrogate's Court and decide that a will said to have been made in 1880 should be treated as a last will to the exclusion of the will made in 1884 and long since admitted to probate, need not be seriously considered. If the adjudications of the State courts are a bar to this proceeding, the question about the will of 1880, even if it would otherwise merit attention, will disappear.

So much of the pleadings and assignments of error as are framed upon allegations of fraud need scant attention. It is not supposed that the appellants will seriously attempt to apply to the decisions of the State courts the doctrine that fraud vitiates all proceedings, or will soberly contend that the doctrine can be successfully invoked to obliterate those decisions and leave this court free to proceed as if no such decisions had been made.

The allegations of fraud made in the pleadings in this cause differ from the similar allegations made by the same parties in their pleadings in the State court chiefly because they are more prodigal of words. The parties had opportunity to give proof under this head in the State courts, and the subject has been there disposed of if the judgments already rendered are a bar to this action.

The real contention of the appellants seems to be that they were entitled to their "day in a court" of original jurisdiction and to a decision by a court of original jurisdiction upon the question of the validity of the releases; that they did not have

this "day in court" or decision upon the trial at Special Term, because Judge Truax thought the question immaterial; that they did not have "the day," or the decision, upon the hearing at General Term, because the General Term is not a court of original, but only of appellate, jurisdiction; that the General Term should have reversed the judgment of the Special Term instead of affirming it, and should have sent the case back for new trial and that because it did not do so, they are now entitled to their "day in court" and to a decision upon that issue, in this cause, as fully as if the question had never been raised before.

POINTS AND AUTHORITIES.

First Point.—THE APPELLANTS HAD THEIR "DAY IN COURT" UPON THE TRIAL AT SPECIAL TERM OF THE NEW YORK SUPREME COURT AND THE JUDGMENT RENDERED BY THAT COURT IS A BAR TO THIS ACTION.

1. Suppose that the New York statutes permitted no appeal from judgments of the Supreme Court sitting as a court of equity at Special Term and that the judgment entered upon the decision of Judge Truax had been final?

   Suppose that under such circumstances this bill had been filed. The complainants would have been asked whether the same question had been presented to the Supreme Court of the State of New York. They must have

answered that it had been. They would have been asked if it was not so presented in a litigation between the same parties that involved the same subject matter. They must have answered yes. They would have been asked if the judgment of the State court was brought here for review by writ of error or appeal and they must have answered no. They would have been asked why the judgment of the State court was not conclusive. Their answer must have been that the opinion of the Judge who tried the case, and his testimony as a witness, showed that in reaching his decision he had treated as immaterial one of the issues that the complainants deemed vital; that he had not so considered that issue as to answer yes or no to the proposition the complainants framed from it; that therefore the complainants had the right to treat that issue as a new and separate cause untouched by the adjudication. Should the Circuit Court have accepted this view of complainant's rights? Should that Court have entertained the bill or dismissed it?

If it should have entertained the bill, then it would seem that litigants may have as many trials of one cause as they have separate arguments to sustain their contention. A litigant usually has several grounds upon which he hopes to prevail. Suppose that he has a dozen. After adverse decision may he examine as a witness the

Judge who tried the case, and having ascertained that the Judge thought eleven of his grounds immaterial and decided against him on consideration of the twelfth, may he maintain eleven new actions in courts of co-ordinate jurisdiction, in order to find whether those courts will not consider some, or *all* of his eleven grounds material? If the Circuit Court should have entertained the bill, then it would also seem that no judgment is an adjudication unless the Court that renders it has passed upon every proposition of the litigants by discussing it at length and answering it "Yes" or "No."

But is it the law that courts cannot safely say of any proposition, or issue, that it is immaterial to the decision? Is it the law that a proposition or issue pronounced immaterial by the Court to which it has been duly presented, has not been adjudicated, but is to be treated as an issue expressly reserved for another trial? Is it the law that litigants have not had their "day in court" in respect to issues that a court has heard and has pronounced immaterial? If a Judge at *nisi prius* excludes testimony as immaterial, has the party who offers it been denied a hearing in respect to the point on which the testimony is offered?

2. If the complainants could have maintained their bill in the United States Circuit Court if no appeal from the judgment of the State

Supreme Court had been permitted under the State laws, then the reason why they could have maintained it would be that the issue as to the validity of the releases had not been adjudicated, but remained available to the complainants as a new, or reserved, cause of action. But if this reason is good then the new or reserved cause of action would be available as the basis of a suit in any court, irrespective of the right to appeal from the Special Term judgment. For, if the reason is good, that judgment did not touch the issue as to the releases, and an appeal from that judgment would only take up the issues touched and determined, not the issues reserved or undetermined.

So, if the reason is good, the complainants could have prosecuted their appeal to the General Term, as they did and could at the same time have filed and maintained this bill in the United States Circuit Court.

Suppose they had attempted to do this.

They would have been asked, Is there another suit pending in the Supreme Court of the State between the same parties for the same cause? They must have answered Yes. They would have been asked if the suit in the State court had been tried and how it had been decided, and must have answered that it had been tried, decided against them and that they had appealed, or had the right to appeal, from the adverse judgment to the

General Term. They would have been asked if the General Term had the power to correct the errors, if any, committed by the Special Term and to give the parties complete remedy. They must have answered Yes. They would have been asked upon what theory they expected to maintain their bill in the Circuit Court. If they had answered that the Special Term had said that one of their issues, which they deemed important, was immaterial, and had not considered it upon its merits; that they proposed to withdraw that issue from the control of the Supreme Court and to rely upon it as a new cause of action in the Circuit Court; that they did not consider that their appeal to the General Term carried that issue up, and that they did not propose to argue that issue before the General Term, would the United States Circuit Court have then entertained the bill? If they had answered that they proposed to treat the issue as carried to the General Term by their appeal; proposed to argue it to the General Term, but to ask the Circuit Court to decide the issue according to their contention in the event the General Term should not so decide it, would the Circuit Court have entertained, or would it have dismissed the bill?

The record shows, as appears in the preceding statement, that the complainants did treat this issue as carried to the General

Term by their appeal; did argue it at General Term and ask its decision by the appellate tribunal. It was not decided in accordance with their contention, and they have sought to segregate or withdraw that issue from the cause decided against them and make it the basis of a new suit.

3. The law is against this attempt of the complainants.

Werlein *v.* New Orleans, 177 U. S., 390.

In the case cited the City of New Orleans sued to recover possession of land from one who derived his title to it through a sale under execution issued on a judgment against the city. The city had previously sued for an injunction to restrain the sale and had been defeated. In the suit at bar the city set up that the land was dedicated to public use long before the sale, and formed part of the public streets of the city. These facts had not been proved in the previous suit brought to enjoin the sale.

This Court, reviewing the authorities, said "It is not disputed that, if there were no question of a prior judgment in this case, proof that the land had been properly and duly dedicated for a public square to the public use, and thereupon had been withdrawn from commerce, would furnish a defense to the claim by any person of a right to

sell the property under an execution upon a judgment against the city. * * * The fact now alleged would have furnished in the chancery suit but another ground, or reason, upon which to base the claim of the city. * * * The threatened sale might have been illegal for a number of reasons based on widely divergent facts, but whatever those reasons were, the facts upon which they rested were open to proof in the chancery action, and if the city desired the benefit of them they should have been alleged and proved. It would seem to be quite clear that the plaintiff could not be permitted to prove each independent fact in a separate suit. Suppose the city had only set up the fact of the registry of the judgment as a ground for enjoining the sale and after a trial on that issue it had been beaten, and judgment had gone against it, could the city after that have commenced another suit for the same purpose and set up as a ground for the alleged illegality of the sale the assignment of the judgment by Klein? In such second action would not the judgment in the prior action conclude the city? If not, then on being beaten on a trial of that issue the city could commence still another action based on the allegation that the judgment had been paid.

"Thus, as many different actions as the city might allege grounds for claiming the

sale would be illegal, could be maintained *seriatim* and no one judgment would conclude the city except as to the particular ground upon which the city proceeded in each particular case." The Court held that the city was concluded by the former adjudication.

See also the opinion of the Court by Judge Andrews in Pray *v.* Hegeman, 98 N. Y. 351–358.

Is there a difference between a ground, or cause, of action not asserted by a litigant in a case where it might have been asserted and a ground asserted and declared by the Court to be immaterial? Is it the law that a litigant is concluded as to a ground or cause of action that he omitted to assert in a case where he might have asserted it and that has not been heard, considered, or determined by a court of original jurisdiction, or by any court; but is not concluded as to a ground or cause of action which he did assert, which has been heard and considered by a court of original jurisdiction and has been by that court decided to be immaterial as the basis of judgment?

Second Point.—THE JUDGMENT OF THE GENERAL TERM DID NOT RELAX THE FORCE OF THE JUDGMENT OF THE SPECIAL TERM AS AN

ADJUDICATION IN BAR OF THIS PROCEEDING. IT ADDED TO THE FORCE OF THE JUDGMENT REVIEWED BY THE GENERAL TERM.

1. If the decision of the General Term had expunged the judgment of the Special Term, so as to make the situation the same as if that judgment had never been rendered, the complainants might have presented their case again by an original bill. If the General Term had reversed the Special Term, the complainants might have had a new trial in that court, or, if they procured a discontinuance, might have resorted to a new tribunal.

   But the General Term affirmed the judgment of the Special Term and left that judgment in full force and effect as an adjudication upon the rights of the complainants to share in the estate of Daniel B. Fayerweather.

2. It does not help the complainants' position to say that the General Term erred; that it mistook its own powers and, acting as a court of original jurisdiction, gave its judgment upon facts that had not been considered by the Court below; that the General Term, instead of affirming the judgment, should have reversed it and sent the case back for a new trial.

   If all these things were so, their substance would be embraced in the phrase "the General Term was in error."

But error of the General Term of the Supreme Court of the State of New York cannot be cured by an original bill in the Circuit Court of the United States. The decision of the General Term is not before this Court by appeal or writ of error, or by any procedure under which this Court can review it. The complainants filed an original bill in the Circuit Court and have asked that Court and this to treat the decision of the General Term as if it never had been—to disregard it. This the United States court cannot do upon the ground that the General Term decision was erroneous. As already mentioned, that decision is not brought here by the method prescribed for purposes of review. And it has been reviewed and affirmed by the tribunal vested with the power to review, to wit, by the Court of Appeals of the State of New York. If this Court or the Circuit Court can disregard the decision of the General Term and treat it as if it never had been, it can do so only on the ground that the decision is manifestly void.

3. But the decision of the General Term was clearly within its powers and added to the decision of the Speeial Term another adjudication of the same cause between the same parties.

Section 1022 of the New York Code of Civil Procedure as it stood at the time of the Special Term decision provided that

"The decision of the Court or the report of a referee upon the trial of the whole issues of fact, may state separately the facts found and the conclusions of law and direct the judgment to be entered thereon, or the Court or referee may file a decision stating concisely the grounds upon which the issues have been decided and direct the judgment to be entered thereon. * * * Whenever judgment is entered on a decision which does not state separately the facts found, the defeated party may file an exception to such decision in which case on an appeal from a judgment entered thereon upon a case containing exceptions the General Term of the Court in which the action is pending shall review all questions of fact and of law, and may either modify or affirm the judgment or order appealed from, award a new trial, or grant to either party such judgment as such party may be entitled to."

Judge Truax, holding Special Term, filed his decision without stating separately the facts found; the defeated party filed an exception to such decision, and appeal was taken to the General Term upon a case containing exceptions (Record, Vol. 4, p. 10).

The power and duty of the General Term in respect to the case are stated in the passage of the Code above quoted. The law says that in such a case the Court "*shall review* all questions of fact and of law, and may

either modify or affirm the judgment or order appealed from, award a new trial or grant to either party such judgment as such party may be entitled to."

On its face this law would seem to make the General Term, in the cases specified, a court of original jurisdiction, clothed with power to determine facts and render judg- upon them as a court of first instance.

Nothing in the Constitution of the State of New York prevented, or now prevents, the Legislature from giving such jurisdiction to the General Term (now the Appellate Division) of the Supreme Court.

Constitution of New York, Art. 6, Secs. 6 and 7 (in force when judgment was rendered), and
Art. 6, Secs. 1 & 2, now in force.

The decisions of the courts of the State of New York have construed this section of the Code and have said that it should be read with reference to Section 1317 of the Code. That section provides that the General Term or Appellate Division " may reverse or affirm, wholly or partly, or may modify, the judgment or order appealed from, and each interlocutory judgment or intermediate order which it is authorized to review, as specified in the notice of appeal and as to any or all the parties ; and it may, if necessary or proper, grant a new trial or hearing."

Construing these sections, the Court of Appeals has said that the General Term may not, as a court of original jurisdiction, make from the record before it on an appeal, new findings of fact to support a new judgment contrary to the judgment appealed from, or to modify the judgment appealed from.

Benedict *v.* Arnoux, 154 N. Y., 715, p. 724.

Cutter *v.* Gudebrod, 168 N. Y., 512.

This is as far as the New York courts have gone in limiting the power given by Section 1022 of the Code as that section stood when the General Term rendered its decision. The decision left the section unlimited and applicable, according to the plain legal import of its terms, to judgments *affirmed* by the General Term. The limitation of the decisions applied only to judgments *reversed* or *modified.*

By the plain legal import of the section the General Term was in duty bound, "to review all questions of fact and of law" and had the power to make new findings of fact in support of the judgment appealed from. The duty to review all questions of fact coincides with the power to grant to either party such judgment as such party may be entitled to. The duty of reviewing facts enables the Court to affirm a judgment on any grounds supported by the record. This is also in ac-

cordance with the practice that prevailed before Section 1022 of the Code took the form above recited.

Ward *v.* Hasbrouck, 169 N. Y., 407, p. 420.

What the General Term did was to approve and affirm the grounds of decision stated by the Special Term to the effect that the proofs showed that the executors and residuary legatees took the estate subject to a trust and not in their own right and that the trust was in favor of the colleges. So far the General Term followed the Special Term. To this the General Term added its decision that "there is no evidence in the record justifying this contention" that the releases were procured by fraud and undue influence.

If this decision be treated as a finding of fact by the General Term, it is a finding that the General Term had power to make in *affirming* the judgment and is an additional decision against the complainants by a Court of competent jurisdiction and after full hearing.

That the Court had power to make this decision in this way two more authorities may be cited. One is Judge Parker, who when examined as a witness was Chief Judge of the Court of Appeals and, as such, an expert whose statement sums up the State decisions. He testified:

"Appellate courts, both in the Appellate Division and the Court of Appeals, occasionally refuse to send back a case when it is plain from the record that no different result can ensue," and "I do not think any member of the Court questioned the power to make the decision as it was made."

(Record, Vol. 3, 568.)

The other authority is the N. Y. Court of Appeals decision affirming the General Term in the Amherst College Case (151 N. Y., 782).

This decision could not have been made if the Court of Appeals had not considered that the General Term acted within its power.

4. But the General Term, in reality, did not make new findings of fact in respect to the releases; on examination of that record it stated and decided, as a proposition of law, that there was not evidence enough to support a verdict or a judgment invalidating the releases.

This is the proper meaning of the expression already quoted from the General Term opinion.

"There is no evidence in the record justifying this condition." It is equivalent to stating that if the Special Term had decided that the releases were obtained by fraud and undue influence the General Term, on an examination of the record, would have reversed the decision on the ground that there

was not enough evidence to sustain it. This is the purport of Judge Parker's testimony when he says: "My recollection is not very distinct, of course, but it is not that there was not any evidence, but that there was not sufficient evidence to impeach them" (Record, Vol. 3, p. 565).

Whether evidence is sufficient to sustain a verdict is a question of law, not a question of fact. Whether evidence is sufficient to require the reversal of a judgment is also a question of law for the Appellate Court to pass upon.

"Whether there is a question of fact in a case is always a question of law, depending, possibly, upon a conflict of evidence and possibly upon conflicting inferences which may be drawn from uncontradicted evidence."

Otten *vs.* Manhattan Rwy. Co., 150 N. Y., 395, p. 401.

It follows that, irrespective of the power of the General Term to make findings of fact in support of a judgment, its decision is unassailable.

Third Point.—THE DECISION OF THE CIRCUIT COURT DISMISSING THE BILL AND CROSS-BILL SHOULD BE AFFIRMED.

A brief is not the best vehicle to convey praise or blame. Courts must decide according to law, whether decisions work help or hardship.

Yet it need not be forgotten that the decision here asked permits the execution of a purpose which, for beneficence of result and absence of self-laudation, is unsurpassed in the history of testamentary provisions.

Mr. Fayerweather's memory should be held in honored remembrance; the more so because he did not direct its perpetuation.

THOS. H. HUBBARD,
Counsel for the President and Trustees
of Bowdoin College.